93-624

Supreme Court, U.S.
FILED
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No. _____

IN THE

**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1993**

CHARLES H. ORR,

Petitioner,

v.

GENERAL MOTORS CORPORATION,
R.P.A., DAYTON-NORWOOD OPERATION

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT IN A CIVIL CASE

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## QUESTION PRESENTED

Whether Petitioner, who was pursuing a claim of race discrimination under Title VII of the Civil Rights Act of 1964, and who presented direct evidence of racial discrimination in his employer's employment practices, was nevertheless required to make a *prima facie* showing of discrimination using the test set forth in the *McDonnell Douglas-Burdine* line of Title VII cases.

## STATEMENT OF CORPORATE AFFILIATION

Plaintiff is not affiliated with any corporation.

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## OPINIONS BELOW

The Report and Recommendation of the Referee (App. 1a) and the Order of the district court adopting that Report and Recommendation (App. 21a) are unreported. The opinion of the Court of Appeals (App. 23a) has not yet been reported.

## JURISDICTIONAL STATEMENT

The decision of the Court of Appeals was rendered on June 11, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the district court was invoked under 42 U.S.C. §§ 1981 and 2000(e), *et seq.*

## STATUTE INVOLVED[1]

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, provides in pertinent part as follows:

**§ 2000e-2 Unlawful employment practices**
**(a) Employer practices.** It shall be an unlawful employment practice for an employer --
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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[1] The 1991 amendments to Title VII, known as the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1076 (1991), codified at 42 U.S.C. § 2000e-2(m) (West Supp. 1992), does not directly bear upon the issue presented in this Petition. However, if Petitioner's position were accepted, the 1991 amendments would become relevant since they eliminate part of an employer's *Price Waterhouse* defense. *See Griffiths v. Cigna Corp.*, 988 F.2d 457, 469 n. 11 (3rd Cir. 1993). Petitioner was precluded from arguing below for a retroactive application of these amendments by *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 86 (1992). However, the Ninth Circuit has recently reached the opposite conclusion. *See Estate of Reynolds v. Martin*, 985 F.2d 470 (9th Cir. 1993). Therefore, if the instant Petition is granted an opportunity would also arise for reconciling the split in the federal circuits on the retroactivity issue.

## STATEMENT OF THE CASE

Mr. Orr was a salaried employee at the Norwood, Ohio, facility of Respondent (hereafter "GM") until GM decided to close that plant. The plant ceased production on August 26, 1987.

GM attempted to help former Norwood employees such as Mr. Orr find new jobs within the organization. A long series of interviews (and some failures to interview) involving Mr. Orr and various other GM plants then took place, beginning in July, 1987, and ending in February, 1990.

These potential openings for new jobs included GM operations in Wilmington, Delaware; Columbus, Ohio; Tarrytown, New York; Shreveport, Louisiana; Dayton, Ohio; Baltimore, Maryland; Kokomo, Indiana; and Warren, Michigan. It is undisputed that Mr. Orr was not hired at any of these facilities.[2]

Mr. Orr admitted below that, in a number of cases, black applicants were hired for the same job. GM

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[2] Some three years after the Norwood facility closed Mr. Orr was hired at a GM facility in Marion, Indiana.

admitted below that, on at least one occasion, Caucasians were hired instead of Mr. Orr. In addition, Mr. Orr believes that Caucasians received positions in Warren, Michigan, for which he was not invited to interview.

There was a vigorous dispute below concerning a missing or altered 1987 performance appraisal contained in Mr. Orr's personnel file. GM claimed that Mr. Orr's missing 1987 appraisal forms was attributable to poor record-keeping. However, on February 7, 1990, Mr. Ernest Lewis, a GM employee in the Norwood personnel department, told Mr. Orr that he had personal knowledge of the destruction of favorable performance appraisals given to black salaried employees at the Norwood plant.

Three separate complaints alleging racial discrimination were filed by Petitioner between April, 1990, and February, 1991. The cases were consolidated and GM subsequently moved for summary judgment. On February 13, 1992, the magistrate to whom the case had been referred issued a Report and Recommendation granting GM's motion for summary judgment with

respect to Petitioner's Title VII claims.[3] The magistrate's Recommendation was squarely grounded on Petitioner's failure to make a *prima facie* case for discriminatory employment practices within the meaning of the test distilled from this court's decisions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). App. 21a.

The district judge adopted the magistrate's Report and Recommendation without further discussion. App. 21a. A timely appeal followed.

The Court of Appeals acknowledged Petitioner's allegation that "GM intentionally discriminated against him by removing an improved employment appraisal from his file and replacing it with one reflecting a lower rating, and by failing to change his education level to reflect his completion of more than one full year of college." The court's decision did not mention Petitioner's allegation that an employee in the personnel department of GM's Norwood plant would further testify

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[3] Also before the district court were a claim under 42 U.S.C. § 1981 and a discovery issue, neither pertinent here.

that other black salaried employees had also had favorable performance appraisals destroyed.

The court then adopted the decision of the district judge, thereby approving the applicability of the *McDonnell Douglas-Burdine* test to the facts of this case.

## REASONS FOR GRANTING THE WRIT

### DESPITE PETITIONER'S PRESENTATION OF DIRECT EVIDENCE OF RACIAL DISCRIMINATION, THE COURTS BELOW ERRONEOUSLY REQUIRED HIM TO MAKE A *PRIMA FACIE* SHOWING UNDER THE *McDONNELL DOUGLAS-BURDINE* DOCTRINE.

With certain necessary variations governed by whether an action is one for age, gender, or race discrimination, and whether it involved hiring, firing, promotion, or transfer, the rulings of this court in *McDonnell Douglas*, *supra*, and *Burdine*, *supra*, generally require an employment discrimination claimant to make a *prima facie* case by showing that he or she was (1) a member of a protected class; (2) qualified; and (3) the subject of an adverse employment decision. In addition, any inference of discrimination so shown must not have

been negated by subsequent action on the part of the employer.

Naturally, in the vast number of employment discrimination actions which have taken place over the twenty years since *McDonnell Douglas* was decided, widely varying factual circumstances have led to a great number of questions as to the shifting of the burden of proof, the effect of mixed motives for the employment action, the showing necessary by a claimant to avoid summary judgment, etc. Then, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a new element was seemingly injected into the above formula, one which led to additional decisions attempting to reconcile the various pronouncements of this Court. As Petitioner will now demonstrate, a conflict among the Circuits has arisen over the application of *Price Waterhouse* to the *McDonnell Douglas-Burdine* line of cases.

In *Price Waterhouse*, the claimant (Ms. Hopkins), an employee of a professional accounting partnership, claimed that she was denied partnership status because of her gender. In order to make a *prima facie* case under

*McDonnell Douglas-Burdine* she would have had to argue that, for example, because 47 males out of the 88 candidates were accepted as partners whereas she, the only woman, was rejected, the employment decision was gender based. Like GM in the instant case, the employer produced evidence tending to show that Ms. Hopkins' rejection was based upon other factors, such as personality traits, lack of contribution to a large project, etc. 490 U.S. at 233-35.

Ms. Hopkins, however, also testified that various male partners had made explicitly gender-based remarks, thus demonstrating directly and not circumstantially that her employer had discriminated against her because she was a woman. Price Waterhouse urged this Court to reconcile the conflicting evidence by requiring Ms. Hopkins to show by "substantial evidence that Price Waterhouse's explanation for failing to promote Hopkins was not the 'true reason' for its action." *Id.* at 246.

The precise holding of this Court's 4-1-1-3 decision in *Price Waterhouse* has been the subject of much debate. *See, e.g., Tyler v. Bethlehem Steel Corp.* (2d Cir.

1992), 958 F. 2d 1176, 1182-83, *cert. denied*, 113 S. Ct. 82 (1992). An oft-quoted passage, urged by Petitioner to the Court of Appeals below, states:

> [O]nce a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.

490 U.S. at 244-45 (footnote omitted). Thus, while not expressly held, it is at least arguable from *Price Waterhouse* that direct (non-circumstantial) evidence[4] of discrimination, of the type presented by Ms. Hopkins in *Price Waterhouse* and by Petitioner here, obviates the

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[4] This is not to suggest that there is such a clear-cut line between "direct" and "non-direct" evidence. The Second Circuit in *Tyler, supra*, identified at least a dozen different definitions of "direct" evidence in a *Price Waterhouse* setting. 958 F. 2d at 1183-84. In the instant case, the direct evidence does not consist of statements by the employer indicating discriminatory intent, but, rather, testimony by another employee that GM destroyed favorable performance appraisals of black salaried employees at its Norwood plant. Since Mr. Orr's altered performance appraisal was in issue all through these proceedings, see App. 16a, 24a, and since his personnel file accompanied him on every interview, these actions by GM constituted direct evidence of a discriminatory intent sufficient, we submit, to eliminate the necessity for a *McDonnell Douglas-Burdine* analysis.

necessity of proving a *prima facie* case under *McDonnell Douglas-Burdine*.[5]

An examination of the opinions below will demonstrate that the Court of Appeals in this action decided that the requirement of making a *prima facie* case is to be retained even when direct evidence of employment discrimination is presented. *See* App. 25a, approving the language contained in the Report and Recommendation of the magistrate (App. 12a). At least one other circuit has come to the same conclusion.

In *Fields v. Clark University*, 966 F. 2d 49 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 976 (1993), a former associate professor brought a sex discrimination action under Title VII, asserting that she had been denied tenure because of her gender. During the course of the first appeal and remand it appeared that the trial court had found that the plaintiff "proved by direct evidence that discrimination was a motivating factor in the

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[5] To be sure, a statement to this effect is contained in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). However, *Thurston* involved a comprehensive written retirement policy held to be discriminatory on its face. *Thurston* was not cited in any of the *Price Waterhouse* opinions.

[employment] decision." 966 F. 2d at 51, quoting the earlier First Circuit decision, 817 F. 2d 931, 937 (1987).

In the second trial, the district court held that "Plaintiff has failed to offer *sufficient* evidence . . . that gender was a motivating factor . . . ." 966 F. 2d at 52. The First Circuit characterized this as failure to "make out her prima facie case of sex discrimination . . . ." *Id.* at 53. It went on to hold that the *Price Waterhouse* standard would only come into play if "the plaintiff *did* successfully make out a prima facie case of discrimination . . . ." *Id.* It then proceeded to set out the elements of a *prima facie* case tailored to the facts of the case before it. *Id.*

It is thus apparent that the First Circuit, like the Sixth Circuit, believes that the *McDonnell Douglas-Burdine* concept of a *prima facie* showing applies whether direct evidence of unlawful discrimination has been offered or not. However, at least four courts of appeals have squarely held to the contrary.

In *Tyler v. Bethlehem Steel Corp.*, *supra*, an age discrimination claimant produced evidence not only of a circumstantial nature, but "much more than mere

qualification for and availability of the position; he proved, to the jury's apparent satisfaction, that age actually entered into Bethlehem's decisional processes." *Id.* at 1187.[6] The claimant sought and obtained from the district judge a "*Price Waterhouse*" instruction. The employer appealed, arguing that true "direct" evidence of discrimination had not been shown, and that, therefore, the instruction had been erroneously given.

The Second Circuit was therefore directly presented with the problem of distinguishing between the *McDonnell Douglas-Burdine prima facie* criteria and a different test under *Price Waterhouse*, if applicable.

The Court reconciled the legal principles as follows:

> Significantly for our purposes, the direct method of proof contemplated by the last step of *Burdine* is the same as the plaintiff's initial burden under *Price Waterhouse* . . . . When the more focused proof of discrimination is presented, the court need not go through the *McDonnell Douglas* analysis.

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[6] The court correctly noted that it was required to apply the same standards under the New York Human Rights Law, N.Y. Exec. Law §§290-301 (McKinney 1982 & Supp. 1992), as under the ADEA or Title VII.

*Id.* at 1185.

The Second Circuit thus clearly held that where a claimant, such as Petitioner in the instant case, presents evidence of actual discrimination rather than seeking to draw inferences from his employer's requirements and his own job qualifications, a *McDonnell Douglas-Burdine* order-of-proof analysis is not required.

Similarly, in *Shager v. Upjohn Co.*, 913 F. 2d 398 (7th Cir. 1990), an age discrimination claimant presented evidence not only that he was qualified and replaced by a younger worker, but that the employer had made explicit comments about age indicating an actual intent to discriminate against older workers. *Id.* at 402.

Judge Posner characterized the claimant's evidence as follows:

> This is not a case where the plaintiff's only evidence of age discrimination is that he was replaced by a younger worker and that the stated ground for firing him is spurious. That would be the kind of case that just barely survives the employer's motion for summary judgment: a case where the evidence of discrimination is entirely circumstantial, indirect. Shager produced direct evidence of hostility to older workers ——

> on the part of Lehnst, his supervisor. Judge Shabaz considered the comments on age attributed to Lehnst to be ambiguous. That they were. But the task of disambiguating ambiguous utterances is for trial, not for summary judgment. On a motion for summary judgment the ambiguities in a witness's testimony must be resolved against the moving party. . . . A plaintiff who makes such a case in resisting the defendant's motion for summary judgment does not need the help of *McDonnell Douglas* to resist the motion. He walks as it were without crutches. For he has presented enough evidence to defeat a motion for summary judgment under the general test for the grant of such a motion, alluded to at the outset of this opinion: if this were the trial rather than a summary judgment proceeding, would the judge be required to grant a directed verdict to the party seeking summary judgment?

*Id.* (emphasis added). The Seventh Circuit thus held clearly that where "direct evidence of hostility" is presented, as it was, in effect, by Petitioner here, the *McDonnell Douglas-Burdine* framework is inapplicable. The Third and Eighth Circuits appear to agree with this principle. *See Adams v. Nolan*, 962 F. 2d 791, 794-95 at n. 6 (8th Cir. 1992); *Beshears v. Asbill*, 930 F. 2d 1348, 1353 (8th Cir. 1991); *Griffiths v. Cigna Corp., supra*, 988 F. 2d at 470 n. 12; *Ezold v. Wolf, Block, Shorr and Solis-Cohen*, 983 F. 2d 509, 522 (3rd Cir. 1992).

Not all of the authorities set out above provide analyses of this issue at equal length and in equal terms. The facts are not identical in any of the cases, nor are they identical to the facts Petitioner now presents to this Court. The authorities do not attempt to distinguish each other. What is clear from the above, however, is that at least two federal courts of appeals require an employment discrimination claimant to meet the *McDonnell Douglas-Burdine* test to avoid summary judgment, while four other circuits expressly dispense with this requirement where direct (non-circumstantial) evidence of actual intent to discriminate is presented.

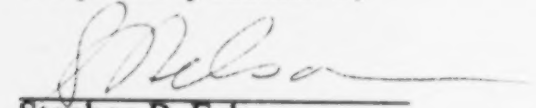
Naturally, Petitioner would argue on the merits that summary judgment must be denied where direct (non-circumstantial) evidence is presented of an actual intent to discriminate, as it was here in Mr. Lewis's testimony concerning the employer's tampering with personnel files of black salaried employees at the Norwood plant. Regardless of which view is correct, however, it is apparent, given the numerous federal and state decisions attempting to distinguish between *Price*

*Waterhouse* and *McDonnell Douglas-Burdine*, that there is an urgent "need for a uniform rule on the point." *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962). This Court should grant the Petition for Certiorari.

## CONCLUSION

For the foregoing reasons, Petitioner Charles H. Orr requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Consolidated Case Nos.
C-1-90-311
C-1-91-070
C-1-91-139

Charles H. Orr,

Plaintiff

vs

The General Motors Corp.
R.P.A. Dayton-Norwood,

Defendant

REPORT AND RECOMMENDATION

Plaintiff Charles H. Orr brings these consolidated actions pro se against defendant General Motors Corporation (GM) alleging race discrimination and retaliation in violation o f Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. This action is before the Court on GM's motion for summary judgment, Orr's response, and GM's reply thereto. (Docs. 13, 17, 19). Also pending is Orr's motion to order GM to produce a summary of its anticipated witnesses' testimony and GM's response thereto. (Docs. 19, 20).

Orr alleges the following. GM, after closing its Norwood, Ohio facility, agreed to assist its affected employees in getting transfers to other GM facilities. Rather than assist Orr in attaining a transfer, GM hindered him by removing his 1987 improved appraisal from his file and replacing it with one reflecting a lower rating. Additionally, GM failed to change his education level to properly reflect that he completed more than one full year of college. Orr maintains that these actions were

purposefully taken by GM in order to racially discriminate and retaliate against him for filing discrimination charges with the Equal Employment Opportunity Commission (EEOC).

GM contends that the individual GM facilities' decisions not to hire Orr were premised on his lack of qualifications rather than on his race of prior EEOC filings. Moreover, it asserts that recent appraisals were missing from other Norwood employees' files, both black and white, due to poor record keeping rather than a scheme to discriminate. It denies that it violated Orr's rights and maintains that Orr's § 1981 claims are time-barred. Alternatively, GM argues that Orr has stated no cause of action under § 1981. Additionally, GM contends that Orr has failed to establish prima facie cases of race discrimination and retaliation under Title VII.

## UNDISPUTED FACTS

The following facts are undisputed:

1. On May 20, 1977, GM hired Orr to work as an hourly employee at its Norwood facility. On or about April 17, 1978, GM selected Orr to participate in its management training program. (Doc. 13, p. 13; Orr Dep.., pp. 111, 117, 122-23).

2. During a portion of 1978 and early 1979, Orr spent approximately ten (10) months, in two separate stints, in a "Supervisor-Production" position. After experiencing several performance problems in a production environment, Orr was reassigned to non-production supervision in i May 1979. Orr never obtained another "Supervisor-Production" position during his tenure at the Norwood facility. (Doc. 13, p. 13; Orr Dep., pp. 143, 146-47, 197, 199, 285 and Dep. Ex. 4).

3. Orr spent his remaining nine (9) years at the Norwood facility as a "Supervisor-Miscellaneous Non Production" in the maintenance department. This position consisted of supervising unskilled maintenance

employees. While in this position, Orr received two performance appraisals from his supervisor: (a) a "4-Good Competent Performance" rating in September 1985; and (b) an improved rating of either a "2" or "3" in November 1987.[1] (Doc. 13, p. 13; Orr Dep., pp. 244-45, 321, 323; Doc. 17, Orr Aff., ¶ 6).

4. Under GM's performance appraisal rating system, there are six categories: "1 - Outstanding Performance, meets standards all of the time, an achievable but seldom attained level of performance;" "2 - Superior Performance - meets standards almost all of the time;" "3 - Highly Effective Performance, meets standards very frequently;" "4 - Good Competent Performance, meets standards frequently;" "5 - Needs Slight Improvement, meets standards infrequently;" and "6 - Needs Much Improvement, meets standards very infrequently." (Doc. 12, Ex. B, ¶ 4).

5. In November 1986, GM announced the impending closing of its Norwood facility. The plant ceased operations on August 26, 1987; and GM laid off all Norwood employees, including Orr, on December 1, 1987, when the plant permanently closed. (Doc. 13, p. 14; Orr Dep., pp. 245, 255).

6. GM informed the Norwood employees of its commitment to find qualified employees available positions in other GM facilities. (Doc. 13, Ex. C, ¶¶ 3, 4). For verification purposes, GM gave all its Norwood employees a printout of pertinent information contained in their records, including social security number, race, and education level. Orr's printout erroneously reflected his education level as eleventh grade. Orr actually completed one full year of college plus two additional college courses. He also attended a GM sanitation seminar and took a year long heating and air conditioning

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[1] Orr contends that he received a "2 - Superior Performance," rating on his 1987 appraisal. (Doc. 17, Orr Aff., ¶ 6). GM disagrees, stating that Orr received a "3 - Highly Effective Performance" rating. (Doc. 13, Ex. B, ¶ 3). The original appraisal is missing.

course.[2] Orr informed the Norwood personnel office of the error in his record and assumed they would correct it. (Doc. 17, Orr Aff. ¶¶ 3-5).

7. Norwood officials told employees that GM interviewers, in selecting candidates for transfer, would consider the following factors: (a) appraisals - 55 to 65 %; (b) education level - 25%; and (c) initial interview - 10%. (doc. 17, Orr Aff., ¶ 7 & Shepherd Aff. ¶ 3). During the interview process, however, GM interviewers were not instructed to, nor did they, utilized any specific "percentage points" or "affixed rating" system based on a particular candidate's education level, current performance appraisal, or performance. (Doc. 13, Ex. D, ¶ 5; & Ex. E, ¶ 3; & Ex. F, ¶ 3; & Ex. G, ¶ 3; & Ex. H, ¶ 3; & Ex. I, ¶ 3).

8. In March or April 1987, prior to the closing of the Norwood facility, Orr interviewed for, but did not receive, one of two available Sanitation Supervisor positions in Tarrytown, New York. Shortly thereafter, in July 1987, Orr interviewed for, but did not receive, a Production Supervisor position in Wilmington, Delaware. About two weeks after the Norwood plant closed, in December 1987, Orr interviewed for, but did not receive, a Sanitary Supervisor position in Kokomo, Indiana. (Doc. 6, p. 2; Orr Dep., p. 284).

9. During the December 1987 Kokomo interview, Orr became aware that the Norwood personnel office had not changed his record to reflect his correct education level.[3] (doc. 17, (Orr Aff., ¶ 10).

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[2] Initially, Orr asserted that he had completed two full years of college. (Doc. 7, p. 2). In so stating, he equated his year long heating and air conditioning course to a full year of college. (Orr Dep., pp. 36-38).

[3] In his second complaint filed in this Court, Case Number 91-070, Orr contends that he did not learn about the personnel office's failure to correct his education level until May 1988. Since, in both his Affidavit and deposition, Orr asserts that he was informed of this discrepancy at the December 1987 Kokomo interview, we accept this as the correct date. (Doc. 17, Orr Aff., ¶ 10; File for Case No. 91-070, Doc. 1, ¶ 9; Orr Dep., p. 248).

10. In May 1988, Don True, Norwood's Director of Manufacture Engineering, contacted Orr about a potential Production Supervisor position opening in GM's Service Parts Operation in Columbus, Ohio. Pursuant to Orr's request, True submitted Orr's name, along with nine other candidates, for consideration. After reviewing the ten candidates' records, the Columbus Parts Distribution Manager offered initial interviews to five individuals. Orr was not selected for an interview. The Manager's decision not to interview Orr was based, not on Orr's race, but rather, upon his belief that there were more qualified candidates. He ultimately hired Hurdie Phillips, Jr., a black male. Phillips, like Orr, had spent the majority of his supervisory experience as a "Supervisor-Miscellaneous Non Production" in Norwood's maintenance department. Unlike Orr, however, Phillips had a Masters Degree in Administration and a Bachelors Degree in Education. (Doc. 13, p. 15 & Ex. C, ¶ 6; Ex. D ¶¶ 2, 4, 6; Orr Dep., pp. 286, 294).

11. During the May 1988 phone call from True regarding the Columbus position, Orr discovered that his improved 1987 appraisal rating was missing from his file. Shortly thereafter, True conferred with Orr's supervisors and decided to re-issue the missing appraisal to reflect a "3 - Highly Effective" rating. This re-issued appraisal was placed in Orr's file in July 1988, without Orr's consent or signature. (Doc. 6, pp. 6,8; Doc. 13, pp. 16-17 & Ex. B, ¶¶ 5-7, 9; Ex. C, ¶¶ 7-11; Doc. 17, Orr Aff., ¶¶ 11, 17; Orr Dep., pp. 222, 226, 228-29, 290-91, 317; 390).

12. In August, 1988, two representatives from GM's Tarrytown, New York facility came to Norwood to interview candidates for several production supervisor positions. Orr admits that, during the interview, he "kind of blew [his] stack" because he was upset over the missing appraisal. The representatives did not select Orr for an on-site interview because of Orr's lack of supervisory experience in production, not because of his race. (Doc. 1, p. 3; Doc. 13, p. 18 & Ex. E, ¶¶ 2, 4; Ex. F, ¶¶ 2, 4; Orr Dep., pp. 315, 393;).

13. On January 24, 1989, Orr filed an EEOC charge against GM alleging race discrimination. Orr based this charge on his belief that GM management purposely removed his 1987 appraisal and lowered his reported education level. As a result, Orr contended, he remained unemployed for approximately thirty-six (36) months after the closing of the Norwood facility. Orr made this charge in response to the Tarrytown (1987 and 1988), Wilmington, and Kikomo interviews which were unsuccessful, as well as the Columbus position for which he was not afforded the opportunity to interview. The EEOC issued a right to sue letter on January 19, 1990, and Orr commenced the instant action on April 19, 1990. (Doc. 1, Exs. A & B; Doc. 17, Orr Aff., ¶¶ 13-15). In his complaint, Orr alleges that the EEOC found probable cause as to the charge. (Doc. 1, p. 1). Subsequently, in his deposition, Orr admits that the EEOC did not find probable cause. Orr blames this inconsistency on an attorney who allegedly drafted Orr's first complaint. Orr signed the complaint, however, while the attorney did not. (Orr Dep., p. 326).

14. In November 1989, GM's Delco Cassis Division-Dayton, Ohio facility (formerly Delco-Moraine-Dayton) began interviewing candidates for several Production Supervisor position openings. After interviewing Orr, they decided not to select him. The head of the interview team, Mark Deem, was not aware that Orr previously filed an EEOC race discrimination charge against GM. The interviewers decided not to select Orr because he did not have the requisite supervisory experience in production and lacked strengths in quality control procedures rather than because of his race or in retaliation for filing EEOC charges. They hired a black woman who had been a Production Supervisor in GM's Warren, Michigan facility to fill one of the positions. (Doc. 13, pp. 19-20 & Ex. H, ¶¶ 2, 4-7; Orr Dep., pp. 239, 335-36).

15. Orr filed a second EEC charge on December 1, 1989, alleging race discrimination and retaliation for filing the first EEOC charge. Orr based this charge on the unsuccessful Dayton interview. The EEOC issued a

right to sue letter on November 2, 1990 and Orr filed a second suit in this Court on January 31, 1991. Because this suit involved issues of law and fact which were common with those in Orr's original suit, the cases were consolidated. (Doc. 10; File for Case Number 91-070).

16. In February, 1990, Orr interviewed for a Sanitation Supervisor position at GM's Truck and Bus Baltimore, Maryland facility. The interview committee selected a more qualified black male for the position. At the time of the decision, the participating interviewers had no knowledge that Orr had filed EEOC charges against GM. (Doc. 13, p. 20 & Ex,. I, ¶ 2, 4-5; Orr Dep., pp. 321-42).

17. Orr filed a third EEOC charge on June 12, 1990, alleging race discrimination and retaliation for filing earlier EEOC charges. He relied on the fact that he had interviewed for, but had not been offered, positions at GM's Dayton, Baltimore and Shreveport, Louisiana facilities. The record does not reflect any information as to the Shreveport position. The EEOC issued a right to sue letter on November 27, 1990, and Orr filed a third suit in this Court on February 28, 1991. Because this suit involved the issues of law and fact common with those in Orr's first two cases, it too was consolidated. (Doc. 12; File for Case Number 91-139; Doc. 17, Orr Aff., ¶ 6).

18. On October 31, 1990, GM offered, and Orr accepted, a position as a Sanitation Supervisor at its Marion, Indiana facility, where Orr is currently a salaried employee. (Doc 13, p. 10; Orr Dep., p. 260;, 355; Doc. 17, Orr Aff., ¶ 15).

## ORR'S ¶ 1981 CLAIMS SHOULD BE DISMISSED

### 1. Law Applicable To 42 U.S.C. § 1981

Title 42 U.S.C. § 1981 provides that all persons "shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." *Patterson v. McLean Credit Union*, 491 U.S. 164,

176 (1989). Thus, § 1981 is limited, and "cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts." *Id.*

Section 1981 protects two rights: (1) the right to make contracts; and (2) the right to enforce contracts. The first protection extends only to contract formation, not to problems which may arise later from the conditions of continuing employment. The statute prohibits the refusal to enter into a contract based upon someone's race, as well as the offer to make a contract only on discriminatory terms. The second protection encompasses the right of access to the legal process in order to address contract claims. Accordingly, "it prohibits discrimination that infects the legal process in ways that prevent one from enforcing contract rights [because] of his or her race . . ." *Id.* at 176-77.

A claim of retaliation, in the form of a discharge or any other form, is not actionable under § 1981. *Stradford v. Rockwell International Corp.*, 755 F. Supp. 760, 765 (S.D. Ohio 1991) (Holschuh, J.) (citing *Penn v. Rockwell International Corp.*, 756 F. Supp 1040 (S.D. Ohio 1990)). Likewise, § 1981 does not apply to allegedly discriminatory discharges. *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1258 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2889 (1991). Additionally, denial of a transfer, not rising to the level of a promotion that would create a new and distinct relationship between the employee and the employer, is not actionable under § 1981. See *Jain v. Cleveland Clinic Foundation*, No. 90-3085, slip op. at 2-3 (6th Cir. Nov. 16, 1990); *Christian v. Beacon Journal Publishing Co.*, No. 89-3822, slip op. at 3-4 (6th Cir. July 17, 1990);
*Stradford*, 755 F. Supp. at 764.

Congress did not establish a statute of limitations for § 1981. Thus, the federal courts have determined that the state limitations period applicable to personal injury actions governs § 1981 actions. *Demery v. City of Youngstown*, 818 F.2d 1257 (6th Cir. 1987). In Ohio, the

residual provision, contained in Section 2305.10 of the Ohio Revised Code, provides for a two year statue of limitations. *Browning v. Pendelton*, 869 F.2d 989 (6th Cir. 1989). Accordingly, the statute of limitations applicable to § 1981 actions is two years.

The applicable statute of limitations begins to run when the plaintiff knows or has reason to know of the alleged violation. *Seiver v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984). A plaintiff has reason to know of a violation when he should have discovered the violation through the exercise of due diligence. *Id.*

**2. Although Orr's § 1981 Allegations Are Not Time-Barred, He Has Failed To State A Claim**

GM incorrectly contends that Orr's § 1981 claims are barred by a one year statue of limitations. The statute of limitations applicable to § 1981 actions is two years.

Orr's first indication that GM may have had alleged discriminatory motives came in December 1987, when he discovered that the Norwood personnel department had failed to correct his education level as requested. *See* Undisputed Fact, ¶ 9, supra, p. 4. Further indication surfaced in May 1988, when Orr discovered that his 1987 appraisal was missing from his file. *See* Undisputed Facts, ¶ 11, supra, p. 5; Orr Dep., p. 286. Giving Orr the benefit of the doubt in assuming that he did not have reason to know of GM's allegedly discriminatory motives until May 1988, the limitations period would begin to run at that time. Since Orr filed his first suit on April 19, 1990, within the applicable two years period, his § 1981 claims are not time-barred.

Orr's allegations regarding denial of a transfer would be actionable under § 1981 only if the transfer were deemed a promotion that created a new and distinct relationship between him and GM. *See Stradford*, 755 F. Supp. at 764-65. To the contrary, GM never voiced an intention to promote the displaced Norwood employees. Rather, it was committed to finding them suitable,

presumably lateral, positions within its other facilities. Orr has presented no evidence to establish that his present position, to which he was transferred in 1990, constituted a promotion that created a new and distinct relationship between Orr and GM. Orr also alleges that GM retaliated against him for filing EEOC charges. Retaliation, however, is not actionable under § 1981. *See Stradford*, 755 F. Supp. at 764. Thus, Orr has stated no § 1981 cause of action upon which relief may be granted and these claims should be dismissed.

## SUMMARY JUDGMENT IS APPROPRIATE WITH REGARD TO ORR'S TITLE VII CLAIMS

### 1. In Order To Avoid Summary Judgment, Orr Must Submit Evidence To Withstand A Directed Verdict Motion

A motion for summary judgment should be granted if the evidence submitted to the court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex Corp.*, 477 U.S. at 323.

A party may move for summary judgment on the basis that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion. In response to a summary judgment motion properly supported by evidence, the non-moving party "is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial." *Sixty Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987); *Harris v. Adams*, 873 F.2d 929, 931 (6th Cir. 1989).

The trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine factual issue for trial. *Anderson*, 477 U.S. at 249-50. In so doing, the trial court does not have a duty to search the entire record to establish that there is no material issue of fact. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989); *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1988). The court should apply the federal directed verdict standard. *Street*, 866 F.2d at 1479. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 249-500.

If, after an appropriate time for discovery, the opposing party is unable to demonstrate a prima facie case, summary judgment is warranted. *Street*, 866 F.2d at 1478 (citing *Celotex* and *Anderson*). This is appropriate when the opposing party fails to make the requisite showing of an essential element. *Kesselring v. United Technologies Corp.*, 753 F. Supp. 1359, 1362 (S.D. Ohio 1991) (Graham, J.). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

**2. Law Applicable to Title VII**

In passing Title VII, congress determined that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 237 (1989). "The principal focus of [Title VII] is The protection of the individual employee, rather than the protection of the minority group as a whole." *Connecticut v. Teal*, 457 U.S. 440, 453-54 (1982). The fact that a work force may be racially balanced cannot immunize an employer from liability for specific acts of discrimination. *Id.*; *Furnco Constr. v. Waters*, 438 U.S. 567, 579 (1978). The obligation imposed by Title VII is to provide an equal employment opportunity for each person regardless of

race and without regard to whether members of that person's race are already proportionately represented in the work force. *Teal*, 457 U.S. at 454-55; *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

Orr's claims are those of disparate treatment. In such a case, he has the burden of proving unlawful discrimination because of race. Proof of discriminatory intent is crucial. *Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc.*, 690 F.2d 88, 92 (6th Cir. 1982); *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1257 (6th Cir. 1981). Because of the difficulty of proving discriminatory motive, the Supreme Court has made available a special order of proof in employment discrimination cases, the initial stage of which is described as plaintiff's prima facie case. *Texas Depart. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Askin v. Firestone Tire & Rubber Co.*, 600 F. Supp. 751, 753-53 (E.D. Ky. 1985), *aff'd without opinion*, 785 F.2d 307 (6th Cir. 1986).

Orr may establish a prima facie case of discriminatory failure to promote or transfer by showing that: (1) he belongs to a racial minority; (2) he applied and was qualified for a job for which the employer was seeking applicants; (3) despite his qualifications, he was rejected; and (4) after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Because the facts vary in Title VII cases, the aforesaid test is by no means the only way to prove a prima facie case of race discrimination. *Id.* at n.13. Plaintiff may also establish a prima facie case by introducing evidence that defendant treated him less favorably than similarly situated white employees. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n. 15 (1977); *Shah v. General Electric*, 816 F.2d 264, 276 (6th Cir. 1987); *Beaven v. Commonwealth of Kentucky*, 783 F.2d 672, 675-67 (6th Cir. 1986).

Orr also claims retaliation. In such a case, he has the burden of proving retaliation by a preponderance of

the evidence. Proof of retaliatory motive is crucial. *See Rowe*, 690 F 2d at 92; *Chrisner*, 645 F.2d at 1257. In order to establish a prima facie case of retaliation under Title VII, Orr must produce evidence that: 1) he engaged in activity protected by Title VII; 2) the GM deciding official knew that he had engaged in such activity; 3) subsequently, the GM official made an employment decision adversely affecting him; and 4) there is a causal link between Orr's protected activity and GM's adverse employment action. *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987); *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 377 (6th Cir. 1984), *appeal after remand*, *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co.*, 783 F.2d 50, 54 (6th Cir. 1986), *cert. denied*, 478 U.S. 1006 (1986). Protected activity consists of opposing any practice made unlawful by Title VII, making a charge, testifying, assisting, or participating in any manner in a Title VII investigation, proceeding or hearing. 42 U.S.C. § 2000e-3(a).

Orr may demonstrate the requisite causal connection by demonstrating disparate treatment. *See Jackson* 743 F.2d at 377. An inference of causal connection may also be drawn where GM's adverse employment action closely followed Orr's protected activity. *Wrenn*, 808 F.2d at 501; *Womack v. Munson*, 619 F.2d 1292, 1296 & n. 6 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981).

By establishing a prima facie case, Orr creates a rebuttable presumption that GM unlawfully discriminated or retaliated against him. *Burdine*, 450 U.S. at 252-53. This presumption is a procedural device that temporarily ceases Orr's burden of producing evidence. Thus, once Orr establishes a prima facie case, the burden of going forward shifts to GM to articulate a legitimate, nondiscriminatory, nonretaliatory reason for its action. *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978); Wrenn, 808 F.2d at 500. The ultimate burden of persuasion never shifts from Orr. *Wrenn*, 808 F.2d at 501. GM need not persuade the court it was actually motivated by nondiscriminatory, nonretaliatory reasons. If GM's evidence raises a genuine issue of fact as to whether it

intentionally discriminated or retaliated against plaintiff, GM has satisfied its burden of going forward. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Wrenn*, 808 F.2d at 501.

If GM articulates a legitimate reason for its action, the presumptions of discrimination and retaliation drop from the case, *Burdine*, 450 U.S. at 255, n. 10, "and the factual inquiry proceeds to a new level of specificity." *Id.* at 255. *See also Aikens*, 460 U.S. at 714-15. A permissible inference of discrimination or retaliation, however, may still be drawn by the trier of fact from the evidence introduced in Orr's case-in-chief. *Proffitt v. Anacomp, Inc.*, 747 F. Supp. 421, 425-26 (S.D. Ohio 1900) (Steinberg, Mag. J.); *Askin*, 600 F. Supp. at 745, 755.

As regards discrimination, once GM articulates a legitimate reason for its action, Orr must prove intentional discrimination, i.e.; that GM treated him in a manner which, but for his race, would have been different. *Aikens*, 460 U.S. at 715; *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978). As regards retaliation, Orr retains the burden of persuasion and must prove by a preponderance of the evidence that his protected activity was a significant factor in GM's employment action. *Polk v. Yellow Freight System*, 876 F.2d 527 (6th Cir. 1989); *Batts v. NLT Corp.*, 844 F. 2d 331, 336 (6th Cir. 1988). Orr need not prove that the discharge would not have occurred absent the protective activity. *Polk*, 876 F.2d at 531.

Orr "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256; *Batts*, 884 F.2d at 336; *Wrenn*, 808 F.2d at 501. "In short, the district court must decide which party's explanation of the employer's motivation it believes." *Aikens*, 460 U.S. at 716.

**3. Orr Has Not Established a Prima Facie Case of Disparate Treatment Under Title VII**

One method of establishing a prima facie case of disparate treatment is for an employee to show that, as a racial minority, he was qualified for the position sought, rejected despite this qualification, and either a white person was selected for the position or the position remained open while the employer continued to seek applications from persons of Orr's qualifications.

At the time he began interviewing for a transfer, Orr had spent approximately ninety percent (90%) of his time with GM in a non-production supervisory position. His only production supervisory experience was ten years earlier, and he was removed from the production environment because of performance problems. *See* Undisputed Facts ¶ 2, *supra* p. 2 This leads to the conclusion that Orr was not qualified for a production supervisory position. This conclusion is further supported by the affidavits of two GM interviewers from facilities seeking Production Supervisors. These interviewers did not select Orr because they felt he lacked the necessary experience. *See* Undisputed Facts ¶¶ 12, 14, *Supra*, pp. 5, 6. Since Orr has neither alleged nor proffered any evidence to the contrary, we conclude that he was not qualified for production supervisory positions. Of all the positions for which Orr interviewed, only the 1987 Tarrytown, Kokomo, and Baltimore positions were for non-production supervisory positions.

Assuming, *arguendo*, that Orr was qualified for all of the positions he sought, he has failed to show that either a white person was hired for one such positions or the positions remained open. Orr has produced no such evidence with regard to any of these positions. In fact, GM hired black people for available positions in its Columbus, Dayton and Baltimore facilities. *See* Undisputed Facts ¶¶ 10, 14, 16, *supra* pp. 4-6. Orr makes only unsubstantiated allegations that he was more qualified than those who were chosen, both black and white. Thus, Orr has not established a prima facie case of disparate treatment under this test.

Alternatively, Orr may establish a prima facie case of disparate treatment by showing that he was treated less

favorably than similarly situated white employees. Orr maintains the following. He originally received a "2-Superior Performance" rating on his 1987 appraisal. GM officials removed this appraisal from his file and replaced it with a re-issued version reflecting a "3-Good Competent" rating. About the same time, GM officials appraised two or three white employees a second time in order to give them a higher rating. Orr concludes that this was done as part of GM's scheme to discriminate against black employees. (Doc. 17, Orr Aff., ¶¶ 11, 17 & Luckett Aff., ¶¶ 3, 4, 6 & Shepherd Aff., ¶ 2; Orr Dep., pp. 222, 226-29, 255, 290-91, 390).

While Orr submits affidavits from himself and two other black employees which support his allegation that the appraisals of certain black employees were lowered from a "2" to a "3," he has proffered no evidence to support his contention that white employees' ratings were made higher or that any of this was part of a GM scheme to discriminate. To the contrary, GM has submitted evidence that Walters, the GM supervisor who evaluated Orr in 1987, originally gave Orr a "3" rather than a "2" on his appraisal and that other maintenance department employees whom he had evaluated in 1987, both black and white, also had appraisals missing from their files. Both Walters and True attribute this error to poor record keeping. (Doc. 13, pp. 16-17 & Ex. B, ¶¶ 5-7, 9; Ex. C, ¶¶ 7-11).

Additionally, Orr contends that GM officials discriminatorily lowered his education level to reflect only an eleventh grade education and then failed to correct the error after he brought it to their attention. In support of this allegation, Orr submits an affidavit. *See* Undisputed Facts ¶¶ 6, 9, *supra* pp. 3, 4. This evidence, however, only supports the fact that GM officials erroneously recorded, then failed to correct, Orr's education level. It does not create an inference of discrimination.

Orr concludes that because he is black and was not hired while whites were, he was treated less favorably. In so stating, however, he fails to show that any hired white

employees were similarly situated. Rather, while making conclusory allegations that those hired had less education and lower performance appraisals, he admits that he does not know who was hired for the majority of the positions he sought. In fact, GM hired black people for available positions in its Columbus, Dayton and Baltimore facilities. *See* Undisputed Facts ¶¶ 10, 14, 16, *supra* pp. 4-6. Orr has failed to show any instances where a similarly situated white person was hired instead of him.

In Orr's 1988 Tarrytown interview, the GM interviewers told him that if his correct education level and 1987 appraisal had been in his file, "there's a good chance" they would have hired him after his first interview in March 1987. Thus, while it appears that Orr has been harmed by GM in this process, he has proffered no evidence which leads to an inference that GM's conduct was discriminatorily motived. Additionally, even though disputes over whether Orr originally received a "2" or a "3" on his 1987 appraisal and whether the interviewers utilized an affixed rating system in selecting candidates for transfer exist, these disputes have no bearing on the issue of whether GM's conduct was discriminatory. Even if resolved in Orr's favor, the disputed issues would still not create an inference that GM treated Orr differently than similarly situated white employees. Consequently, since Orr has failed to establish a prima facie case of disparate treatment under Title VII, summary judgment is appropriate.

**4. Orr Has Not Established a Prima Facie Case of Retaliation Under Title VII**

Orr filed his first EEOC charge on January 24, 1989. Therefore, only hiring decisions which took place after that date could have been retaliatory. The Dayton and Baltimore interviews took place subsequent to January 24, 1989.

Orr engaged in protected activity when he filed EEOC charges, thereby establishing the first element of a prima facie case of retaliation. He has not, however, established that the GM decision-makers knew, or had

reason to know, that he had engaged in such activity. To the contrary, GM submitted affidavits from the interviewers for the Dayton and Baltimore positions who stated that, at the time of their decision not to hire Orr, they were not aware that Orr had filed EEOC charges against GM. *See* Undisputed Facts ¶¶ 14, 16, *supra*, p. 6. Orr has also failed to show a causal connection between the protected activity and GM's adverse employment action. Rather, he has made only conclusory allegations of retaliation based upon the fact that he was not offered the jobs. *See Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987); *Gutierrez v. Lynch*, 826 F.2d 1534, 1538-39 (6th Cir. 1987). Consequently, since he has failed to establish a prima facie case of retaliation in violation of Title VII, summary judgment on this claim is appropriate.

In Orr's third EEOC charge, filed June 12, 1990, he alleged that GM retaliated against him by not hiring him for the Shreveport, Louisiana position. *See* Undisputed Fact ¶ 16, *supra*, p. 6. In his deposition, he states that he filed an EEOC race and retaliation charge three days before he got to Shreveport. Presumably, he is referring to his second EEOC charge. He further contends that Ms. Driscoll, who is located in the GM Michigan headquarters, knew about this charge. Without offering any evidence to connect Ms. Driscoll with the Shreveport interviewers, Orr concludes that, because he was not offered the job, Ms. Driscoll must have told the Shreveport interviewers about the EEOC charges. *See* Orr Dep., p. 353. Orr also contends that GM hired a less qualified white male for the available position rather than him. *See* Orr Dep. pp. 353-55. Orr did not disclose the date of this interview nor did he support these allegations with any evidence. Consequently, he has failed to establish a prima facie case of retaliation regarding this position.

## ORR'S MOTION TO ORDER GM TO PRODUCE A SUMMARY OF ANTICIPATED WITNESS TESTIMONY IS MOOT

Having determined that GM's motion for summary judgment should be granted, Orr's motion to Order GM to produce a summary of anticipated witness testimony is moot.

**IT IS THEREFORE RECOMMENDED THAT:**

1. Orr's § 1981 claims be DISMISSED.

2. GM's motion for summary judgment with regard to Orr's Title VII claims be GRANTED.

3. Orr's motion to Order GM to produce a summary of anticipated witness testimony be deemed MOOT.

Date: 2-10-92

/s/
Robert A. Steinberg
United States Magistrate

FILED
Kenneth J. Murphy
Feb 13 10:55 a.m. '92
U.S. DISTRICT COURT
S.W. Cincinnati

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHARLES H. ORR,

Plaintiff, C-1-90-311
C-1-91-070
C-1-91-139

v.

GENERAL MOTORS CORP.,

Defendants.

ORDER

This matter is before the Court pursuant to reference to the United States Magistrate as a special master pursuant to 28 U.S.C. Section 636(b)(2), Rule 53 of the Federal Rules of Civil Procedure, and Section 1.5(1) of the Western Division Rule No. 1 in the United States District Court for the Southern District of Ohio. Pursuant to such reference the Magistrate reviewed the pleadings and filed with this Court findings of Fact and Recommendations for Disposition. Subsequently plaintiff filed objections to such Report and Recommendation.

The Court has reviewed the comprehensive findings of the magistrate and considered de novo all of

the filings in this matter. Upon consideration of the foregoing the Court does determine that such Recommendation should be adopted.

Accordingly judgment is hereby entered as set forth specifically in such Report and Recommendation.

IT IS SO ORDERED.

/s/
Carl B. Rubin, Judge
United States District Court

FILED
Kenneth J. Murphy
Mar 24 1:46 p.m. '92
U.S. DISTRICT COURT
S. W. Cincinnati

NOT FOR PUBLICATION

92-3418

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| CHARLES H. ORR, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | ON APPEAL |
| | ) | FROM THE |
| | ) | UNITED |
| v. | ) | STATES |
| | ) | DISTRICT |
| GENERAL MOTORS CORP. | ) | COURT FOR |
| | ) | THE |
| Defendant-Appellee | ) | SOUTHERN |
| | ) | DISTRICT OF |
| | ) | OHIO |

BEFORE: KEITH and BATCHELDER, Circuit Judges; and CHURCHILL, District Judge.[1]

PER CURIAM.

Plaintiff-Appellant, Charles H. Orr, appeals a summary judgment ruling for the Defendant-Appellee, General Motors Corporation, R.P.A. ("GM"). For the reasons stated below, we **AFFIRM**.

Charles Orr alleges that GM discriminated against him on the basis of his race and retaliated against him for filing a complaint with the Equal Employment

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[1] The Honorable James P. Churchill, United States District Judge for the Eastern District of Michigan, sitting by designation.

Opportunity Commission, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. Specifically, Orr alleges that after closing its Norwood, Ohio facility, GM agreed to transfer its affected employees. Orr claims that instead of assisting him in attaining a transfer, GM intentionally discriminated against him by removing an improved employment appraisal from his file and replacing it with one reflecting a lower rating, and by failing to change his education level to reflect his completion of more than one full year of college. Orr also claims was not transferred to GM facilities located in Columbus, Ohio, and Tarrytown, New York because of his race. He further alleges that GM did not transfer him to a GM facility in Dayton, Ohio, because of his race and in retaliation for filing an EEOC charge.

The district court adopted the magistrate's report and recommendation, and granted GM's motion for summary judgment dismissing Orr's claims. Having carefully considered the record and the issues presented in the briefs and at oral argument, we find no error

warranting reversal. Therefore, we **AFFIRM** the decision of the Honorable Carl B. Rubin, United States District Judge for the Southern District of Ohio, Western Division, for the reaons [sic] set forth in his March 24, 1992, order.

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|---|---|
| ISSUED AS MANDATE: | July 7, 1993 |
| COSTS: | None |
| FILING FEE | $ |
| PRINTING | $ |
| TOTAL | $ |

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

FILED
Jun 11 1993
LEONARD GREEN, Clerk